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16 UBIQUITI NETWORKS INC. and UBIQUITI
17 NETWORKS INTERNATIONAL LIMITED

18 SYNOPSYS, INC.,

19 Plaintiff,

20 v.

21 UBIQUITI NETWORKS, INC., UBIQUITI
22 NETWORKS INTERNATIONAL LIMITED,
23 CHING-HAN TSAI, and DOES 1-20,
24 inclusive

25 Defendants.

26 UBIQUITI NETWORKS, INC. and UBIQUITI
27 NETWORKS INTERNATIONAL LIMITED,

28 Counterclaimants,

v.

SYNOPSYS, INC.,

Counterdefendant.

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Case No. 3:17-cv-00561-WHO

**UBIQUITI NETWORKS, INC. AND
UBIQUITI NETWORKS
INTERNATIONAL LIMITED'S
MOTION TO EXCLUDE THE
EXPERT TESTIMONY OF JAMES
E. MALACKOWSKI AND
WILLIAM HASLER**

Date: November 21, 2018

Time: 10 a.m.

Place: Courtroom 2, 17th Floor

Judge: Hon. William H. Orrick

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
FACTUAL BACKGROUND	1
James Malackowski	1
A. Actual Damages Methodology.....	2
B. Statutory Damages Methodology.....	2
William Hasler	3
A. Compliance with the Code	3
B. Ubiquiti's Investigation.....	5
LEGAL STANDARD.....	5
ARGUMENT	6
I. MALACKOWSKI'S TESTIMONY IS UNRELIABLE AND UNDULY SPECULATIVE.....	6
A. Malackowski's 'Actual Damages' Calculation Makes Critical Errors	6
1. Malackowski's actual damages calculation is 'unconstrained by reality' ..	7
2. Malackowski's impermissibly ignores uncontested and material facts	8
3. Malackowski's methodology is lacking because he takes into account the identity of the hypothetical buyer	9
4. Malackowski's calculation improperly relies on information not known to the parties at the time of alleged first act of circumvention.....	10
B. Malackowski Has No Basis for Calculating the Statutory Damages Contained in His Report	11
1. Malackowski is not relying on his own non-existent technical expertise ..	11
2. Malackowski did not rely on any other expert witnesses in this case.....	12
3. The call-home data in no way speaks for itself.....	12
4. Malackowski may not perform a straight-line extrapolation of unreliable data to calculate damages.....	14
II. HASLER'S TESTIMONY IS IRRELEVANT, PREJUDICIAL, AND INVADES TO PROVINCE OF THE JURY	15
1. The opinions are irrelevant and more prejudicial than probative	15
2. Hasler seeks to invade the province of the jury	16

TABLE OF CONTENTS (continued)

2			
3	3.	Opinions regarding supposed breaches of fiduciary duties should be excluded	19
4	4.	Hasler's opinions lack a sufficiently reliable foundation.....	20
5	III.	CONCLUSION	21
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Askanase v. Fatjo</i> , 130 F.3d 657 (5th Cir. 1997).....	16
<i>Bell v. Taylor</i> , 827 F.3d 699 (7th Cir. 2016).....	1, 7
<i>Biotechnology Value Fund, L.P. v. Celera Corp.</i> , No. C 13-03248 WHA, 2015 WL 138168 (N.D. Cal. Jan. 9, 2015).....	<i>passim</i>
<i>Dash v. Mayweather</i> , 731 F.3d 303 (4th Cir. 2013).....	8, 9
<i>Daubert v. Merrell Dow Pharmas., Inc.</i> , 509 U.S. 579 (1993).....	<i>passim</i>
<i>Design Data Corp. v. Unigate Enter., Inc.</i> , 847 F.3d 1169 (9th Cir. 2017).....	13
<i>Fail-Safe, L.L.C. v. A.O. Smith Corp.</i> , 744 F. Supp. 2d 870 (E.D. Wis. 2010).....	8
<i>Fujifilm Corp. v. Motorola Mobility LLC</i> , No. 12-CV-03587-WHO, 2015 WL 757575 (N.D. Cal. Feb. 20, 2015).....	16
<i>Hangarter v. Provident Life & Accident Ins. Co.</i> , 373 F.3d 998 (9th Cir. 2004).....	19
<i>Interplan Architects, Inc. v. C.L. Thomas, Inc.</i> , No. 4:08-CV-03181, 2010 WL 4366990 (S.D. Tex. Oct. 27, 2010)	7
<i>Jarvis v. K2 Inc.</i> , 486 F.3d 526 (9th Cir. 2007).....	7
<i>Jinro Am. Inc. v. Secure Investments, Inc.</i> , 266 F.3d 993 (9th Cir. 2001).....	15
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999).....	5
<i>LaserDynamics, Inc. v. Quanta Comput. USA, Inc.</i> , 694 F.3d 51 (Fed. Cir. 2012).....	10
<i>Lassalle v. McNeilus Truck & Mfg., Inc.</i> , No. 16-CV-00766-WHO, 2017 WL 3115141 (N.D. Cal. July 21, 2017)	20

1	<i>LeClercq v. Lockformer Co.</i> , No. 00 C 7164, 2005 WL 1162979 (N.D. Ill. Apr. 28, 2005).....	8
2		
3	<i>Leland Medical Centers, Inc. v. Weiss</i> , 2007 WL 2900599 (E.D. Tex. Sept. 28 2007)	9
4		
5	<i>LGS Architects, Inc. v. Concordia Homes</i> , 434 F.3d 1150 (9th Cir. 2006), <i>overruled on other grounds by eBay Inc. v.</i> <i>MercExchange, L.L.C.</i> , 547 U.S. 388 (2006).....	10
6		
7	<i>Lust v. Merrell Dow Pharmas., Inc.</i> , 89 F.3d 594 (9th Cir. 1996).....	6
8		
9	<i>Mattel, Inc. v. MGA Entm't, Inc.</i> , No. CV 04-9049 DOC, 2011 WL 836418 (C.D. Cal. Mar. 4, 2011).....	9
10		
11	<i>M Seven Sys. Ltd. V. Leap Wireless Int'l, Inc.</i> , No. 12-cv-1427 CAB (RBB), 2014 WL 12026065 (S.D. Cal. June 4, 2014)	13
12		
13	<i>Oracle Corp. v. SAP AG</i> , 765 F.3d 1081 (9th Cir. 2014).....	1, 6, 7, 10
14		
15	<i>Perez v. Seafood Peddler of San Rafael, Inc.</i> , No. 12-CV-00116-WHO, 2014 WL 2810144 (N.D. Cal. June 20, 2014)	15
16		
17	<i>Polar Bear Prods., Inc. v. Timex Corp.</i> , 384 F.3d 700 (9th Cir. 2004).....	8
18		
19	<i>Rearden LLC v. Walt Disney Co.</i> , 293 F. Supp. 3d 963 (N.D. Cal. 2018)	13
20		
21	<i>RSI Corp. v. Int'l Bus. Machines Corp.</i> , No. C-08-03414 RMW, 2013 WL 1087468 (N.D. Cal. Mar. 13, 2013).....	19
22		
23	<i>S.E.C. v. Daifotis</i> , No. C 11- 00137 WHA, 2012 WL 2051193 (N.D. Cal. June 7, 2012).....	17
24		
25	<i>S.O.S., Inc. v. Payday, Inc.</i> , 886 F.2d 1081 (9th Cir. 1989).....	10
26		
27	<i>Subafilms, Ltd. v. MGM-Pathe Commc'n Co.</i> , 24 F.3d 1088 (9th Cir. 1994).....	13
28		
	<i>Therasense, Inc. v. Becton, Dickinson & Co.</i> , No. C 04-02123-WHA, 2008 WL 2323856 (N.D. Cal. May 22, 2008)	16
	<i>United States v. Chang</i> , 207 F.3d 1169 (9th Cir. 2000).....	11

1	<i>United States v. Lukashov,</i> 694 F.3d 1107 (9th Cir. 2012).....	15
2		
3	Statutes	
4	17 U.S.C.	
5	§ 1201(a)(1)(A)	11, 13
5	§ 1203(c)(3).....	2
6	Other Authorities	
7	Fed. R. Evid. 403	15
8	Fed. R. Evid. 702	5, 6, 11
9		
10		
11		
12		
13		
14		
15		
16		
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NOTICE OF MOTION AND MOTION

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on Wednesday, November 21, 2018, at 10:00 a.m., or as
4 soon as the matter may be heard by the Honorable William H. Orrick in Courtroom 2 of the
5 United States District Court for the Northern District of California, 450 Golden Gate Avenue,
6 San Francisco, CA 94102, Defendants and Counterclaimants Ubiquiti Networks, Inc. and
7 Ubiquiti Networks International Limited (“UBNT”) will and hereby do move this Court for an
8 Order excluding the expert testimony of William Hasler and James E. Malackowski.

9 This motion is based on this Notice of Motion and Motion; the Declaration of Wendy Ray
10 in Support of the Motion and the material attached thereto; the record in this matter; and such
11 other written or oral argument as may be presented before this motion is taken under submission
12 by the Court.

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INTRODUCTION

The testimony of two Synopsys experts, James Malackowski and William Hasler, should be excluded because they are unreliable, not supported by the facts and, as to Hasler, irrelevant. Their testimony would mislead the jury and should be excluded under Federal Rule of Evidence 702 and *Daubert*.

Malackowski's damages testimony is unreliable as a matter of law. First, Malackowski seeks to calculate "actual damages" by [REDACTED]

¹⁰ See *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014). But

Malackowski's methodology ignores critical and uncontroverted evidence of

Instead, Malackowski

This is

improper as a matter of law. *See Bell v. Taylor*, 827 F.3d 699, 709-710 (7th Cir. 2016). Second, Malackowski calculates statutory damages using [REDACTED]

For these reasons, his testimony should be excluded.

The testimony of Hasler, Synopsys' expert on corporate governance, fares no better. Hasler does little more than make unsubstantiated—and irrelevant—legal claims that Ubiquiti somehow violated its fiduciary duties before giving his own spin on “facts” that have been spoon-fed to him by Synopsys’ counsel. Hasler recently had similar testimony excluded by a court in the Northern District of California. *See Biotechnology Value Fund, L.P. v. Celera Corp.*, No. C 13-03248 WHA, 2015 WL 138168, at *2 (N.D. Cal. Jan. 9, 2015). This Court should do the same.

FACTUAL BACKGROUND

James Malackowski

Synopsys seeks actual and statutory damages for UBNT's¹ supposed unauthorized use of

¹ “UBNT” refers collectively to Defendants Ubiquiti Networks, Inc. and Ubiquiti Networks International Limited.

1 Synopsys' software. Synopsys relies on the expert opinion of Malackowski to support these
 2 claims. Malackowski offers both a calculation of "actual damages" based on [REDACTED]
 3 [REDACTED] and an alternative calculation of statutory damages based [REDACTED]
 4 [REDACTED]

5 **A. Actual Damages Methodology**

6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] (Declaration of Wendy J. Ray In Support of Ubiquiti Networks, Inc. and Ubiquiti
 9 Networks International Limited's Motion to Exclude Expert Testimony ("Ray Decl.") Ex. A at
 10 47, 49, 53, 55-56, 58.)² But his methodology does not account for two important factors. First,
 11 [REDACTED]
 12 [REDACTED] (Ex. B at 136:13-137:10.) Second, [REDACTED]
 13 [REDACTED] (*Id.*
 14 at 132:22-133:1.)

15 **B. Statutory Damages Methodology**

16 For statutory damages, Malackowski [REDACTED]
 17 [REDACTED]
 18 [REDACTED] (*See, e.g.*,
 19 Ray Decl. Ex. A at 4-6.) Critically, however, [REDACTED]
 20 [REDACTED] as required under the statute. 17 U.S.C.
 21 § 1203(c)(3). [REDACTED]
 22 [REDACTED] (Ray Decl. Ex. A at 18.) But no Synopsys
 23 expert offers an opinion that [REDACTED]
 24 [REDACTED] And the only person with whom Malackowski discussed [REDACTED]
 25 [REDACTED] Norm Kelly, lacks the requisite knowledge to support Malackowski's

26 _____
 27 2 [REDACTED]
 28

1 assumptions. (See Ray Decl. Ex. F at 183:14-185:6 (confessing that “won’t pretend to be the
 2 expert” on call-home data specification).)

3 Further, Malackowski erroneously [REDACTED]

4 [REDACTED] (See Ray
 5 Decl. Ex. A at 40-41.) [REDACTED]

6 [REDACTED] (Ray Decl. Ex. B at 145:15-147:7.)

7 **William Hasler**

8 Synopsys proffers Hasler as an expert to opine on two areas of corporate governance.

9 **A. Compliance with the Code**

10 Hasler first opines on whether

11 Ubiquiti diligently enforce[d] its own corporate code of conduct and
 12 business ethics (the “Code”) in connection with the matters at issue in this
 13 case, measured ... against the appropriate corporate governance and risk
 management practices for enforcement of corporate codes of business
 conduct and ethics and similar governance guidelines.

14 (Ray Decl. Ex. C ¶ 10.)

15 Although Hasler claims that he is measuring Ubiquiti’s actions “against the appropriate
 16 corporate governance and risk management practices for enforcement of corporate codes of
 17 business conduct and ethics and similar governance guidelines” (*id.*), he subsequently testified
 18 that he is in fact measuring Ubiquiti’s actions *against the Code itself*. In other words, he is
 19 opining *only* as to whether Ubiquiti “implement[ed]” its Code and “diligently execute[d] it.”

20 (Ray Decl. Ex. D at 34:24-35:15.)

21 That testimony, however, is at complete odds with his expert report:

- 22 • I was asked to determine, among other things, whether Ubiquiti made a diligent
 23 effort to enforce its own corporate ethics policy. My opinion, *viewed from the
 perspective of appropriate public company governance and risk management
 practices*, is that it did not. (Ray Decl. Ex. C ¶ 12 (emphasis added).)
- 24 • I viewed Ubiquiti’s actions in accordance with my experience with respect to
 25 *standard corporate governance practices that a reasonable company would
 employ*. (*Id.* ¶ 13.)
- 26 • *I understand the duty of care to mean (in practice)* that directors must be
 27 informed about material facts of the company’s business, transactions, and risks,
 including such events as information on illegal activity at the company and related
 28 investigations.... A director or executive is required to exercise the same degree

1 of care in the company's business as would be expected of a party to an arm's-
 2 length transaction.³ (*Id.* ¶ 31 (emphasis added).)

3

- 4 • *Duty of care is of special importance in this case:* it would dictate that Ubiquiti's
 5 Board should have been informed about the ITCA Notification (and if
 6 management did not timely inform the Board, the Board should have considered
 7 an appropriate investigatory process and disciplinary action against management
 8 when it found out about the litigation). The Board should have also supervised
 9 the investigation of the allegations in the ITCA Notification, and any following
 10 disciplinary action and remedial programs. Timely investigation and remediation
 11 of any potentially illegal activity brought to management's attention is an
 12 important part of risk management practices by a company's board and officers,
 13 and risk management is an important part of the duty of care. It can protect the
 14 corporation against regulatory, legal, and reputational actions and loss. (*Id.* ¶ 32
 15 (emphasis added).)

16 It is even at odds with other testimony at the same deposition:

17 The only aspect of the corporate governance standards and literature that's
 18 relevant to [my opinion] is primarily the duty of care. That's why, even in
 19 this write-up, I quite quickly moved away from duty of loyalty and
 20 focused on duty of care.

21 (Ray Decl. Ex. D at 52:3-22.)

22 Despite these clear statements that Hasler was "focus[ing] on duty of care" and that it "is
 23 of special importance to this case," Hasler contradicted himself by testifying that the discussion
 24 of fiduciary duties in his report was included only as "background" (*Id.* at 35:4-6; 44:17-45:7),
 25 and that

26 Certainly if they knowingly established that code as a standard for
 27 behavior and violated it, that would be a question for someone on whether
 28 they met their duty of care. It's *not* the opinion I'm rendering.

29 (*Id.* at 82:20-24 (emphasis added); *see also* 64:17-65:15 ("not a lawyer" and not "making any
 30 sort of a legal opinion").) Later, Hasler submitted an extensive errata to his deposition testimony
 31 that contained a number of significant substantive changes. (See Ray Decl. Ex. E.) In one of his
 32 changes he stated that his report's reference to the duty of care was a "drafting error" and upon

33 ³ As Hasler conceded at his deposition, this is not even the correct standard because a
 34 director owes a *fiduciary* duty to a corporation. (Ray Decl. Ex. D at 87:17-18.) Rather than
 35 admit that he did not review his expert report before he signed it, however, Hasler dissembled:
 36 "The way I understand this sentence is that a director certainly has a fiduciary duty. And sort of
 37 a minimum expectation would be what is the end of this sentence. Certainly not less than what a
 38 party in an arm's length transaction would do." (*Id.* at 89:18-23.) And when asked where this
 39 incorrect statement of law in his expert report on a director's duty of care came from, Hasler
 40 responded: "May have the page numbers incorrect. I'm not sure." (*Id.* at 86:21-22.)

1 “further reflection, I would strike it from my report.” (*Id.* at 2.)

2 Regardless of whether Hasler is comparing Ubiquiti’s conduct to the Code itself *or* to
 3 “appropriate corporate governance and risk management practices” is immaterial, however, because
 4 neither comparison is relevant nor an appropriate role for an expert.

5 **B. Ubiquiti’s Investigation**

6 Hasler also opines on whether

7 Ubiquiti leadership put appropriate effort (consistent with proper governance
 8 practices) to discover the truth in its investigation of Synopsys’ and IT
 9 Compliance Association’s (ITCA) allegations of software piracy, ... [measured]
 ... against appropriate corporate governance and risk management practices to
 address receipt of a notification of illegal activity at a company.

10 (Ray Decl. Ex. C, ¶ 10.)

11 In this case however, he does not simply analyze whether Ubiquiti followed its Code,
 12 “because the investigatory process is not spelled out in the code.” (Ray Decl. Ex. D at 125:12-
 13 14.) Instead, he describes a multi-step investigatory process that he considers to be appropriate
 14 for what he refers to as “an important corporate event” (Ray Decl. Ex. C, ¶ 71), and, not
 15 surprisingly, concludes that Ubiquiti did not comply with the specific steps he identifies by
 16 “relying on the record that was provided” to him by Synopsys’ counsel and considering the
 17 investigation “in terms of the governance standards and form[ing] an opinion as to whether it
 18 was an adequate process.” (Ray Decl. Ex. D at 147:1-11.)

19 Again, the standard to which Hasler is comparing Ubiquiti’s conduct may be confusing,
 20 but the standard he uses is immaterial because any such comparison is neither relevant nor an
 21 appropriate role for an expert.

22 **LEGAL STANDARD**

23 “[S]cientific, technical, or other specialized [expert] knowledge” may be admissible where
 24 the expert testimony “will help the trier of fact to understand the evidence or to determine a fact
 25 in issue” Fed. R. Evid. 702. However, expert testimony is admissible only if it is:
 26 (1) “based on sufficient facts or data,” (2) “the product of reliable principles and methods,” and
 27 (3) the expert has “reliably applied the principles and methods to the facts of the case.”

28 *Biotechnology*, 2015 WL 138168, at *1. It is the trial court’s duty to serve as a “gatekeeper” for

1 expert opinion, and, as such, it must “ensur[e] that an expert’s testimony both rests on a reliable
 2 foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S.
 3 579, 597 (1993). This gatekeeping duty applies to all expert testimony, not just “scientific”
 4 testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

5 **ARGUMENT**

6 **I. MALACKOWSKI’S TESTIMONY IS UNRELIABLE AND UNDULY
 7 SPECULATIVE**

8 Synopsys cannot demonstrate the admissibility of Malackowski’s opinion because it is not
 9 “the product of reliable principles and methods” and does not rest “on a reliable foundation.”
 10 Fed. R. Evid. 702; *Daubert*, 509 U.S. at 597; *see also Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d
 11 594, 598 (9th Cir. 1996) (“It is the proponent of the expert who has the burden of proving
 12 admissibility.”).

13 **A. Malackowski’s ‘Actual Damages’ Calculation Makes Critical Errors**

14 Malackowski’s actual damages opinion is based on [REDACTED]

15 [REDACTED]
 16 [REDACTED] *Oracle*, 765 F.3d at 1087. The calculation
 17 cannot be “based on ‘undue speculation.’” *Id.* at 1088. It must rest on “sufficient *objective*
 18 *evidence of the market value* of the hypothetical license.” *Id.* at 1093 (emphasis added). The
 19 proper inquiry involves “an objective, not a subjective, analysis.” *Id.* at 1088. The question is
 20 not “what the owner would like to have charged if unconstrained by reality, but what a willing
 21 owner actually would have charged after negotiation with the buyer.” *Id.*

22 To determine the “actual damages” Synopsys allegedly suffered in this case, Malackowski

23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED] (*See Ray Decl. Ex. A at 6-9.*) This is improper for at least four
 26 reasons: [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 1. **Malackowski's actual damages calculation is 'unconstrained by**
7 **reality'**

8 [REDACTED]
9 [REDACTED]
10 [REDACTED] *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (quoting *On Davis v.*

11 *The Gap, Inc.*, 246 F.3d 152, 166 (2nd Cir. 2001)). [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED] (Ray Decl. Ex. B at 111:11-15.) [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] (*Id.* at 112:2-114:17.) [REDACTED]

18 [REDACTED] (*See id.* at 116:6-25.)

19 [REDACTED]
20 [REDACTED] The plaintiff in *Bell* attempted to
21 prove actual damages from the unlicensed use of his photograph by submitting an affidavit stating
22 that he charged \$200 for use of his photos and a webpage showing that the advertised price for
23 using the photograph was \$200. *Bell*, 827 F.3d at 709. The court, however, held that this was
24 insufficient as a matter of law because the plaintiff produced no evidence that "he has ever
25 actually had a buyer willing to pay \$200 for his photo" and that the evidence showed only the
26 plaintiff's "subjective belief as to the fair market value." *Id.*

27 The Ninth Circuit has made clear that Malackowski cannot [REDACTED]
28 [REDACTED]

1 [REDACTED]
 2 *Oracle*, 765 F.3d at 1088. In *Jarvis*, the Ninth Circuit was clear that the actual damages
 3 calculation must be “objective” and avoid “references to what [the seller] thought he should have
 4 earned or wished he had charged.” *Jarvis*, 486 F.3d at 534; *see also Interplan Architects, Inc. v.*
 5 *C.L. Thomas, Inc.*, No. 4:08-CV-03181, 2010 WL 4366990, at *11 n.11 (S.D. Tex. Oct. 27, 2010)
 6 (holding that actual damages are not measured by “what Plaintiff would have charged Defendant
 7 for a license” but by “what the plaintiff would have received”) (emphasis in original). Because
 8 Malackowski bases his analysis only on [REDACTED]
 9 [REDACTED]

10 **2. Malackowski impermissibly ignores uncontested and material facts**

11 Even if Malackowski were able to [REDACTED]
 12 [REDACTED]—something he was unable to do in his deposition—his methodology would still be
 13 improper because it explicitly ignores uncontested, material facts that courts have held should be
 14 used in the [REDACTED] First, Malackowski ignores [REDACTED]
 15 [REDACTED] (Ray Decl. Ex. B at 136:13-137:10.) This is despite the fact that courts have held that price quotes made to
 16 the defendant can form the basis for an actual damages calculation. *See Polar Bear Prods., Inc.*
 17 *v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004) (affirming actual damages award based on
 18 expert analysis that considered the price “Polar Bear actually quoted to Timex”). Second,
 19 Malackowski ignores [REDACTED]
 20 [REDACTED] (Ray Decl. Ex. B at 132:22-133:1), although [REDACTED] is precisely the sort of
 21 information that courts have held [REDACTED] *See Dash v.*
 22 *Mayweather*, 731 F.3d 303, 319 (4th Cir. 2013) (“evidence of a copyright holder’s own prior sale
 23 or licensing of copyrighted work can support the existence of actual damages”).

24 A court may exclude expert testimony as unreliable if it “ignores obvious and uncontested
 25 material facts.” *LeClercq v. Lockformer Co.*, No. 00 C 7164, 2005 WL 1162979, at *4 (N.D. Ill.
 26
 27
 28

1 Apr. 28, 2005). Doing so “amounts to cherry-picking,” and “such selective use of facts fails to
 2 satisfy the scientific method and *Daubert*.” *Id.* (internal quotation marks omitted); *see also Fail-*
 3 *Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 889-90 (E.D. Wis. 2010). Malackowski’s
 4 opinion, however, is premised on ignoring these “obvious and uncontested material facts” and
 5 should be excluded on that basis.

6 **3. Malackowski’s methodology is lacking because he takes into account
 7 the identity of the hypothetical buyer**

8 The only reason Malackowski provides for ignoring [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED] (Ray Decl. Ex. B at
 13 129:7-130:11.) This is improper.

14 The question is **not** what Synopsys [REDACTED]
 15 [REDACTED] but what the “objective market value of the copyrighted work” without taking into
 16 account “what the specific copyright plaintiff and defendant would have agreed to in a
 17 hypothetical bilateral negotiation.” *Mattel, Inc. v. MGA Entm’t, Inc.*, No. CV 04-9049 DOC
 18 (RNBx), 2011 WL 836418, at *4 (C.D. Cal. Mar. 4, 2011); *see also Dash*, 731 F.3d at 313 (fair
 19 market value “is not what the owner would have charged,’ nor what the infringer might have
 20 been willing to pay”) (quoting *On Davis*, 246 F.3d at 166); *Leland Medical Centers, Inc. v. Weiss*,
 21 2007 WL 2900599, at *7 (E.D. Tex. Sept. 28 2007) (holding that it is irrelevant “what [the seller]
 22 would have charged, just as it is not relevant what [the infringer] would have paid”). “Rather, the
 23 *objective inquiry* focuses on the fair market value of the work as ‘negotiat[ed] between a willing
 24 buyer and a willing seller’ contemplating the use the infringer made.” *Dash*, 731 F.3d at 313
 25 (emphasis added).

26 Here, Malackowski asserts that Ubiquiti would not have [REDACTED]
 27 [REDACTED]—because of a vague explanation that Synopsys
 28 would not have expected [REDACTED]

1 (Ray Decl. Ex. B at 129:7-130:11.) But analyzing a [REDACTED]
 2 [REDACTED] is improper and instead the proper analysis is what a hypothetical buyer
 3 and seller of the license would have agreed to. *Mattel*, 2011 WL 836418, at *4.

4 **4. Malackowski's calculation improperly relies on information not
 known to the parties at the time of alleged first act of circumvention**

5
 6 Even assuming arguendo that Malackowski's methodology was not defective because he
 7 [REDACTED] the methodology would be
 8 improper for the additional reason that it relies on information that was not known to the parties at
 9 the time the hypothetical negotiation was supposed to take place. One of the only reasons
 10 provided in Malackowski's expert report for using the [REDACTED]
 11 [REDACTED]
 12 [REDACTED] (Ray
 13 Decl. Ex. A at 52.) Furthermore, Malackowski was asked during his deposition [REDACTED]
 14 [REDACTED]
 15 [REDACTED] (Ray Decl. Ex. B at 124:21-125:5.) He answered: [REDACTED]
 16 [REDACTED] (*Id.*)

17 As a matter of law, the hypothetical negotiation must take place at the date of first
 18 infringement. *Oracle*, 765 F.3d at 1087. As the Federal Circuit explained in the patent context,
 19 “the correct determination of the hypothetical negotiation date is essential for properly assessing
 20 damages.” *LaserDynamics, Inc. v. Quanta Comput. USA, Inc.*, 694 F.3d 51, 75 (Fed. Cir. 2012).
 21 The correct date “must relate to the time infringement occurred, and not be an after-the-fact
 22 assessment.” *Id.*; *see also Oracle*, 765 F.3d at 1090 (“[W]e look to the expectations of the parties
 23 at the time of the hypothetical negotiation in determining the hypothetical-license value.”). In the
 24 copyright licensing context, infringement begins at the time the licensee exceeds the scope of the
 25 license. *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1156 (9th Cir. 2006),
 26 *overruled on other grounds by eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1089 (9th Cir. 1989).

27
 28 Here, Malackowski does not give a [REDACTED]

1 [REDACTED]
 2 [REDACTED] (Ray
 3 Decl. Ex. A at 52.) This is an inappropriate basis for [REDACTED] and Malackowski's
 4 opinion should be excluded on this basis.

5 **B. Malackowski Has No Basis for Calculating the Statutory Damages
 6 Contained in His Report.**

7 Malackowski is not a technical expert in this case, but his statutory damages calculation
 8 depends on the answer to a technical question: [REDACTED]

9 [REDACTED] *See* 17 U.S.C.
 10 § 1201(a)(1)(A). Malackowski's answer [REDACTED] (Ray Decl. Ex. A at 40, Fig.
 11 13.) But he has no basis to use that number and his opinions based on it should be excluded.
 12 *Daubert*, 509 U.S. at 597 (1993) (the trial judge has the "task of ensuring that an expert's
 13 testimony . . . rests on a reliable foundation").

14 **1. Malackowski is not relying on his own non-existent technical
 15 expertise**

16 Malackowski is an expert on [REDACTED]
 17 [REDACTED]
 18 (Ray Decl. Ex. A at 2.) He has no expertise in [REDACTED]
 19 [REDACTED] (*Id.*) As such, he has no way of providing an expert opinion on [REDACTED]

20 [REDACTED] *United States v. Chang*, 207 F.3d 1169, 1173 (9th Cir. 2000) (affirming
 21 exclusion of expert witness testimony when expert did not have "the requisite 'knowledge, skill,
 22 experience, training, or education' required by Rule 702"). To his credit, Malackowski admits
 23 this. During his deposition, Malackowski was asked whether he had an opinion on [REDACTED]
 24 [REDACTED]
 25 [REDACTED] (Ray Decl. Ex. B at 170:2-7.) He went on to say [REDACTED]

26 [REDACTED] (*Id.*; *see also id.* at 164:5-
 27 165:15.)
 28

1 **2. Malackowski did not rely on any other expert witnesses in this case**

2 While Malackowski cannot rely on [REDACTED]
 3 [REDACTED] He testified [REDACTED]
 4 [REDACTED] (*Id.* at 63:8-12.) He also testified [REDACTED]
 5 [REDACTED] (*See id.* at 14:15- 22; 63:13-20.) And
 6 Synopsys' technical expert Dr. Stephen Edwards confirmed that [REDACTED]
 7 [REDACTED] (*See Ray Decl. Ex. G* at 196:2-5.) Despite that fact, Malackowski states in his
 8 report that [REDACTED]
 9 [REDACTED]
 10 [REDACTED] (*Ray Decl. Ex. A* at 18.)

11 The only person Malackowski seems to have discussed [REDACTED]
 12 [REDACTED] (*Ray Decl. Ex. B* at 154:25-155:8.) But Kelly lacks the requisite knowledge to support
 13 that the call-home data represents a circumvention. (*See Ray Decl. Ex. F* at 183:14-185:6) Kelly
 14 is director of the license compliance program at Synopsys. (*See id.* at 48:14-16.) Kelly is not on
 15 the software engineering team that implements the Synopsys License Key system (*see id.* at 73:5-
 16 17; *Ray Decl. Ex. H* at 29:4-25), and he testified, “I won’t pretend to be the expert” on call-home
 17 data specification (*Ray Decl. Ex. F* at 183:17-18.).

18 **3. The call-home data in no way speaks for itself**

19 To the extent Synopsys argues that [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED] (*See, e.g., Ray Decl. Ex. A* at 17 n.68; *see Dkt. No. 240, 241-*
 23 5; *Ray Decl. Ex. B* at 164:5-165:2.)

24 Malackowski’s lack of knowledge about [REDACTED]
 25 [REDACTED] For example, he failed to notice that [REDACTED]
 26 [REDACTED] (*See Dkt. No. 253-20, 255-13 ¶¶ 194-201.*) Synopsys’ technical expert Dr. Edwards, [REDACTED]
 27 [REDACTED]

1 [REDACTED]
 2 [REDACTED] (See Ray Decl. Ex. G at
 3 128:18-2; *see also id.* at 134:16-135:4, 136:22-137:5; *see* Dkt. No. 253-16 [REDACTED]
 4 [REDACTED].) Indeed, Dr. Edwards admitted that [REDACTED]
 5 [REDACTED] (See Ray Decl. Ex.
 6 G at 116:20-117:2).

7 Dr. Edwards also confirmed that [REDACTED]
 8 [REDACTED]
 9 [REDACTED] (See *id.* at 82:9-15; *see also* Ray Decl. Ex. F at 193:13-194:1; *see* Dkt. No. 253-16
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED] *See* 17 U.S.C. § 1201(a)(1)(A). [REDACTED]

14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] In fact, [REDACTED]
 17 [REDACTED]
 18 [REDACTED] (See Ray Decl. Ex.
 19 G at 35:9-18; *see also id.* at 43:5-11 (explaining that [REDACTED]
 20 [REDACTED]
 21 [REDACTED] Synopsys does not own the copyright to [REDACTED] as a matter of law. *See Design*
Data Corp. v. Unigate Enter., Inc., 847 F.3d 1169, 1173 (9th Cir. 2017) (holding that user of
 22 software who provides “lion’s share” of creativity owns output of software); *Rearden LLC v. Walt*
Disney Co., 293 F. Supp. 3d 963, 970 (N.D. Cal. 2018) (same). Thus, Malackowski’s
 23 methodology [REDACTED] is unreliable.

24 Malackowski also fails to [REDACTED]
 25 [REDACTED]
 26 [REDACTED] *M Seven Sys. Ltd. v. Leap Wireless Int’l, Inc.*, No. 12-cv-1427 CAB (RBB), 2014

1 WL 12026065, at *6 (S.D. Cal. June 4, 2014) (“If the modification occurred in South Korea or in
 2 another foreign nation, then the DMCA would have no application, because ‘United States’
 3 copyright laws have no application to extraterritorial infringement.””) (citing *Subafilms, Ltd. v.*
 4 *MGM-Pathé Commc’ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994)).

5 Just as the Ninth Circuit held that the presumption against extraterritoriality, necessary to
 6 avoid “unintended clashes between our laws and those of other nations,” applied to the Copyright
 7 Act, this Court should presume that the DMCA does not extend to wholly extraterritorial acts.
 8 See *Subafilms*, 24 F.3d at 1097-98 (acting otherwise could “disrupt the international regime for
 9 protecting intellectual property that Congress so recently described as essential”); *accord*
 10 Synopsys’ own witnesses confirm that [REDACTED]

11 [REDACTED] (See Ray Decl. Ex. H at 272:19-23; Ray Decl. Ex. I at 485:9-21; *see also*
 12 Ray Decl. Ex. H at 271:7-272:18; Ray Decl. Ex. I at 485:9-21; Ray Decl. Ex. J at 52:22-54:21;
 13 Ray Decl. Ex. F at 329:12-15). [REDACTED]

14 [REDACTED]

15 **4. Malackowski may not perform a straight-line extrapolation of
 16 unreliable data to calculate damages**

17 To calculate damages for [REDACTED]

18 [REDACTED] (See Ray Decl. Ex. A
 19 at 40-41.) Not only is [REDACTED]

20 [REDACTED] (See *id.*) [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] (See Ray

24 Decl. Ex. G at 303:20-25.) Malackowski also ignores the fact that [REDACTED]
 25 [REDACTED]
 26 (See Ray Decl. Ex. A at 40; Ray Decl. Ex. I at 400:11-401:21; Ray Decl. Ex. F at 235:11-236:10.)

27 Given Malackowski’s lack of [REDACTED]

28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] and
 3 must be excluded. *Daubert*, 509 U.S. at 597 (1993) (the trial judge has the “task of ensuring that
 4 an expert’s testimony . . . rests on a reliable foundation”).

5 **HASLER’S TESTIMONY IS IRRELEVANT, PREJUDICIAL, AND INVADES TO
 6 PROVINCE OF THE JURY**

7 Hasler’s “opinions”—such as they are—should be excluded for at least four reasons.
 8 They: (i) are wholly irrelevant and more prejudicial than probative; (ii) “invade[] the province of
 9 the jury,” *United States v. Lukashov*, 694 F.3d 1107, 1116 (9th Cir. 2012); (iii) are on legal
 10 matters; and (iv) lack a foundation.

11 **1. The opinions are irrelevant and more prejudicial than probative**

12 Hasler’s opinions regarding alleged deficiencies in Ubiquiti’s handling of Synopsys’
 13 claims of software piracy have *no* relevance to the claims and defenses in this case. This case
 14 concerns allegations by Synopsys that a small group of UBNT employees in Taiwan fraudulently
 15 acquired copies of Synopsys’ software for evaluation purposes, and that they subsequently used
 16 that software with a counterfeit license key. (See Dkt. No. 211.) Because those allegations have
 17 *nothing* to do with how Ubiquiti trained its employees on its Code and enforced its Code, or how
 18 much Ubiquiti’s Board of Directors knew at any given time about the allegations, Hasler’s
 19 opinions are irrelevant and should be excluded. *Perez v. Seafood Peddler of San Rafael, Inc.*, No.
 20 12-CV-00116-WHO, 2014 WL 2810144, at *4 (N.D. Cal. June 20, 2014) (Orrick, J.) (“‘Expert
 21 testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.’”)
 22 (quoting *Daubert*, 509 U.S. at 591).

23 Further, instead of offering expert testimony that will “assist the trier of fact to understand
 24 the evidence or to determine a fact in issue,” Synopsys is using Hasler for a smear campaign
 25 against Ubiquiti with unsupported insinuations that Ubiquiti’s executives and Directors may have
 26 violated their fiduciary duties. *Daubert*, 509 U.S. at 591. Such testimony will unfairly prejudice
 27 Ubiquiti because the jury may believe that Ubiquiti should be punished for conduct that took
 28 place long after the alleged unlicensed use of Synopsys software that is the basis for this case.

1 Even if the testimony were relevant—which it is not—it is well settled that “[o]therwise
 2 admissible expert testimony may be excluded under Fed. R. Evid. 403 if its probative value is
 3 substantially outweighed by the danger of unfair prejudice.” *Jinro Am. Inc. v. Secure*
 4 *Investments, Inc.*, 266 F.3d 993, 1006 (9th Cir. 2001). That is the case here. Hasler’s opinions
 5 should be excluded because they are both irrelevant and prejudicial.

6 **2. Hasler seeks to invade the province of the jury**

7 Expert testimony “should be excluded if it … invades the province of the jury.”
 8 *Lukashov*, 694 F.3d at 1116 (citation and internal quotation marks omitted). “Where expert
 9 testimony ‘simply rehash[es] otherwise admissible evidence about which [the expert] has no
 10 personal knowledge, such evidence—taken on its own—is inadmissible.’” *Fujifilm Corp. v.*
 11 *Motorola Mobility LLC*, No. 12-CV-03587-WHO, 2015 WL 757575, at *27 (N.D. Cal. Feb. 20,
 12 2015) (Orrick, J.) (quoting *Highland Capital Mgmt., L.P. v. Schneider*, 379 F.Supp.2d 461, 469
 13 (S.D.N.Y. 2005)); *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (“Whether the officers
 14 and directors breached their fiduciary duties is an issue for the trier of fact to decide. It is not for
 15 [the expert] to tell the trier of fact what to decide. Therefore, the trial court did not err in finding
 16 [the expert]’s testimony inadmissible.”). “One of the worst abuses in civil litigation is the
 17 attempted spoon-feeding of client-prepared and lawyer-orchestrated ‘facts’ to a hired expert who
 18 then ‘relies’ on the information to express an opinion.” *Therasense, Inc. v. Becton, Dickinson &*
 19 *Co.*, No. C 04-02123-WHA, 2008 WL 2323856, at *1 (N.D. Cal. May 22, 2008).

20 The regurgitation of spoon-fed facts is, in fact, all that Hasler does—and this is not the
 21 first time. In *Biotechnology*, nearly all of Hasler’s expert opinion was excluded because he
 22 sought to do the jury’s job for them. *Biotechnology*, 2015 WL 138168, at *2. As Judge Alsup
 23 found:

24 The Hasler Report is littered with the expert’s summaries of fact witness
 25 testimony and opinions on whether there is sufficient evidence of certain
 26 occurrences. The Hasler report also impermissibly opines on whether
 27 defendants’ alleged actions comported with the law. The report begins
 most of its sections with paragraphs detailing the industry standard for
 certain conduct. This is what expert testimony should look like. The
 Hasler report then goes too far in applying these standards of care to the
 case at hand and enters the realm of the jury.

1 *Id.* at *3.

2 As Judge Alsup explained, “where the expert does little more than read depositions and
 3 deposition exhibits and other such materials, and then proposes to render findings to the jury as to
 4 what happened, we should draw the line and bar such testimony.” *Id.* at *2. “The retained
 5 witness, of course, has no personal knowledge of what really occurred and should never be
 6 allowed to divine for the jury the truth of what actually occurred or what the mental state of an
 7 actor was.” *Id.* Allowing an “expert” to invade the province of the jury like this is problematic as
 8 these “experts invariably try to tell the jury whose version is truthful.” *Id.* “This is usually done
 9 through artful use of the word ‘understanding,’ as in ‘it is my understanding that there is no
 10 evidence that’ followed by a point on trial.” *Id.* “[E]xperts should not be vouching for whose
 11 fact version is more credible.” *Id.*; *see also S.E.C. v. Daifotis*, No. C 11- 00137 WHA, 2012 WL
 12 2051193, at *2 (N.D. Cal. June 7, 2012) (same).

13 Hasler in fact admitted at his deposition that his opinion is largely confined to stating what
 14 “actually happened” based upon his review of documents and deposition testimony provided to
 15 him by Synopsys’ counsel. For example, Hasler testified as follows in connection with his
 16 opinion on whether Ubiquiti complied the Code:

17 Q: You were trying to figure out what *actually happened* in terms of
 18 Ubiquiti’s implementation and enforcement of its code of conduct?

19 A: Yes.

20 Q: And then you measured what actually happened against what the
 21 code of conduct said should happen; is that correct?

22 Q: Right.

23 (Ray Decl. Ex. D at 79:13-23 (emphasis added).)

24 Hasler uses the same approach for both opinions that he offers. When asked if he was
 25 “comparing what you believe actually happened at Ubiquiti against its code of conduct?” He
 26 responded: “That’s right.” (*Id.* at 145:24-146:6.) When asked if he was “comparing what you
 27 believe actually happened at Ubiquiti against governance practices relating to investigations,”
 28 Hasler responded: “That’s correct.” (*Id.* at 146:7-14.) Hasler repeatedly testified that his opinion
 was largely confined to what Ubiquiti actually did. “My opinion just focuses, as we’ve said

1 numerous times, on whether they implemented and executed their code.” (*Id.* at 82:17-19.) When
 2 asked: “So you were comparing what would normally be expected from understanding the
 3 standards to what *actually occurred* at Ubiquiti?,” he answered “As I understood it.” (*Id.* at
 4 144:3-11 (emphasis added).)

5 Not surprisingly, Hasler has *no* personal knowledge of any facts underlying his opinion:
 6 Q: “So you don’t have any personal knowledge of what happened at Ubiquiti; correct? A: No.
 7 The analysis is based on the information I was given, again, depositions, forms, e-mails, et cetera.
 8 That’s all I was able to analyze.” (*Id.* at 111:14-19; *id.* at 147:1-11 (“I relied on the materials that
 9 I had access to. You earlier pointed out that I may or may not know what actually happened. I’m
 10 relying on the record that was provided to me.”); *id.* at 186:18-25 (“To my knowledge, based on
 11 the materials I was able to see, there’s no indication that there was a designated ethics officer.”);
 12 *id.* at 187:10-12 (“Q: How do you know that? A: There’s no evidence of it in any of the
 13 material.”); *id.* at 244:4-20 (“I’m saying that’s what I concluded from the documents I read.”); *id.*
 14 at 258:7-13 (“I only was able to look at the documents that were available, and they’re
 15 disclosed.”).) In fact, Hasler explicitly testified that the *entirety of paragraphs 33 through 70 and*
 16 *78 through 112* of his expert report were simply a summary of his interpretation of facts for
 17 which he had no personal knowledge. (*Id.* at 94:1-9; 95:1-111:19; 134:8-140:19.)

18 Long after his deposition was complete, apparently realizing that his admissions would
 19 effectively bar his testimony, Hasler submitted an errata in which he changes his admissions to
 20 denials. (Ray Decl. Ex. E at 2-3.) Hasler states in his errata that he “[m]isunderstood” the
 21 question, and now states that he is discussing a “corporate governance standard or practice,”
 22 rather than just summarizing his take on the facts. (*Id.*) What this new-found standard or practice
 23 is, he does not say. Nor could he. The record in his deposition and his expert report is clear:
 24 Hasler is merely interpreting facts and no post hoc explanation about a “misunderstanding”
 25 changes that.

26 In fact, Synopsys used Hasler to do exactly what Judge Alsup previously cautioned
 27 against: smuggling in facts through an expert “through artful use of the word ‘understanding,’ as
 28 in ‘it is my understanding that there is no evidence that’ followed by a point on trial.”

1 *Biotechnology*, 2015 WL 138168, at *2. It is as if Judge Alsup read Hasler’s deposition transcript
 2 in this case. (*See, e.g.*, Ray Decl. Ex. D at 25:25-26:5 (“And **my understanding** from that
 3 testimony . . .”); *id.* at 62:11-16 (“I’m certainly aware that some state’s laws are quite relevant.
 4 California’s, **I understand** from lawyers, are quite relevant.”); *id.* at 227:18-19 (“**My**
 5 **understanding** was it was -- it was not used by the same group.”); *id.* at 228:12-14 (“**My**
 6 **understanding** was it was another group”); *id.* at 228:17-22 (“**my understanding** is that software
 7 development was done at Ubiquiti by project teams”); *id.* at 242:2-4 (“**I understand** that that was
 8 his first step.”); *id.* at 245:21-23 (“**my understanding** is he wasn’t his supervisor”); *id.* at 263:1-9
 9 (“**my understanding** was he was the direct supervisor”); *id.* at 280:20-281:1 (“**my understanding**
 10 from what I was able to see was that the audit committee and the board were not informed of this
 11 matter”); *id.* at 287:7-11 (“they weren’t informed is **my understanding**”).

12 As if this regurgitation of facts based upon Synopsys’ spoon-feeding of documents is not
 13 enough, Hasler even makes *credibility* determinations. When presented with “conflicting
 14 testimony” between three Ubiquiti employees, Hasler decided which employee’s testimony was
 15 “more likely to be correct” and relies on it in forming his “opinion” as to what actually happened
 16 at Ubiquiti. (*See* Ray Decl. Ex. C at 22 n. 88; Ray Decl. Ex. D at 293:7-294:6.) This is entirely
 17 improper. *See Biotechnology*, 2015 WL 138168, at *2 (“[E]xperts should not be vouching for
 18 whose fact version is more credible.”).

19 The “expert” analysis Hasler offers here is precisely the sort that was excluded in
 20 *Biotechnology*. This Court should do the same.

21 **3. Opinions regarding supposed breaches of fiduciary duties should be
 22 excluded**

23 Hasler repeatedly testified in response to questions about corporate fiduciary duties that he
 24 was “not a lawyer” and was not “making any sort of a legal opinion.” (*See, e.g.*, Ray Decl. Ex. D
 25 at 64:17-65:15.) This lack of expertise, however, did not stop him from opining that the “[d]uty
 26 of care is of special importance in this case: it would dictate that Ubiquiti’s Board should have
 27 been informed about the ITCA Notification.” (Ray Decl. Ex. C at ¶ 32.) Despite his opinion in
 28 his report as to what the duty of care requires, Hasler subsequently testified at his deposition that

1 he included this discussion of fiduciary duties only as “background.” (Ray Decl. Ex. D at 35:4-6;
 2 44:17-45:7.)

3 To the extent that Hasler seeks to opine on fiduciary duties and whether Ubiquiti’s
 4 officers and Directors abided by them, those opinions should be excluded because “instructing the
 5 jury as to the applicable law ‘is the distinct and exclusive province’ of the court.” *Hangarter v.*
 6 *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); *see also RSI Corp. v.*
 7 *Int’l Bus. Machines Corp.*, No. C-08-03414 RMW, 2013 WL 1087468, at *4 (N.D. Cal. Mar. 13,
 8 2013) (striking expert’s entire opinion because it was “mostly legal opinion and an unhelpful
 9 restatement of the facts as he sees them”).

10 **4. Hasler’s opinions lack a sufficiently reliable foundation**

11 Judge Alsup found in *Biotechnology* that the industry standards articulated by Hasler were
 12 the *only* topic on which he could testify, but Hasler did *not* even provide industry standards here.
 13 *Biotechnology*, 2015 WL 138168, at *2. Other than discussions of legal duties that Hasler later
 14 testified are “background,” Hasler cites to a single 12-year old treatise for the proposition that it is
 15 a “best practice” to hire an outside investigator.⁴ (See Ray Decl. Ex. K at SNPS0061206-07.)
 16 Beyond this, Hasler provides no other industry standards with which the Court or the jury can
 17 assess his opinions. Rather, he makes a series of conclusions on what he would have
 18 “expect[ed]” to have happened in this case, and how Ubiquiti failed to live up to this unarticulated
 19 standard. (See, e.g., Ray Decl. Ex. C ¶¶ 16, 71-73, 75-76.)⁵

20 Indeed, when asked to point to where in his report he had articulated “governance
 21 standards” or “normal governance processes,” Hasler repeatedly declined to do so, explaining that
 22 the topic was so enormous as to make that an impracticable task. (Ray Decl. Ex. D at 31:12-22

23 _____
 24 ⁴ Tellingly, Hasler’s report omits that the “best practices” tip is offered in the context of
 25 an anticipated government investigation, not a complaint from a third party. (Ray Decl. Ex. D at
 26 273:1-275:18.)

27 ⁵ Other than his copious cites to the factual record, the single other citation that Hasler
 28 provides in support of any industry standard is an article on providing sexual harassment training
 29 in compliance with California employment law—which he applies by analogy to his conclusion
 30 that in-person training for a code of ethics is something that a company should consider. (Ray
 31 Decl. Ex. C ¶ 32.)

1 (“Well, there are books and books and books and books written about them. If you want to talk
 2 about all of them, it would take quite a while.”); *id.* at 34:13-17 (“The governance literature is
 3 massive. There’s—every law professor writes about it. There’s—the ABA provides all sorts of
 4 direction to nonlawyers about what it means. There’s textbooks written. It’s massive.”); *id.* at
 5 49:23-50:2 (“The entire body of literature, which I have read and become knowledgeable on, is
 6 part of what I’m applying in forming an opinion.”). Yet, despite his assertion that there was a
 7 “massive” amount of literature to support his opinions, he does not provide any.

8 The unexplained basis for the opinions in Hasler’s report, and his inability to provide them
 9 even at his deposition, present a situation similar to what the Court confronted in *Lassalle v.*
 10 *McNeilus Truck & Mfg., Inc.*, where the Court concluded that errors in the expert’s report,
 11 together with inconsistencies in his deposition testimony, together indicated “a lack of reliable
 12 reasoning and methodologies.” No. 16-CV-00766-WHO, 2017 WL 3115141, at *5 (N.D. Cal.
 13 July 21, 2017). The situation is no different here where Hasler even managed to opine as to a
 14 *wrong* standard of care owed by a director to a company: “A director or executive is required to
 15 exercise the same degree of care in the company’s business as would be expected of a party to an
 16 arm’s-length transaction.” (Ray Decl. Ex. C ¶ 31; Ray Decl. Ex. D at 89:18-23.)

17 Because there is no established and objective basis for Hasler’s “governance standards,”
 18 his testimony cannot assist the trier of fact and should be excluded.

19 **III. CONCLUSION**

20 This Court should exclude the testimony of Malackowski and Hasler because their expert
 21 opinions are unreliable, irrelevant, unduly speculative, and invade the province of the jury.

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1 Dated: October 11, 2018

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